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Supreme Court, U.S.
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In The

Supreme Court of the United States

MARGIE R. GEORGE,

Petitioner,

v.

CITY OF MORRO BAY; DAVID R. HUNT; PHILIP F. SINCO; AND WILLIAM YATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Constitution unequivocally guarantees that no person shall be deprived of life, liberty or property without due process, nor shall private property be taken for public use without just compensation. Seventy-five years ago this Court held that when private property is taken, "the right to compensation is mandatory and cannot be taken away by statute."

For twenty-two years, this Court has declined to hear petitions for certiorari regarding the effect of "rejection" while federal and state courts remain divided. While some courts view rejection as a breach, others have found that rejection is a complete termination of all of a lessee's rights under the lease, including state law contract rights as well as the right to compensation under the Fifth Amendment. State Supreme courts are divided as well. This is an important question of federal law that has not, but should be, settled by this Court.

The questions presented are:

1. Whether 11 U.S.C. § 365(d)(4) "as applied" constitutes an unconstitutional taking without compensation of a debtor's property.

2. Has the district court's failure to follow this Court's governing precedent denied petitioner the due process and equal protection guaranteed by the Constitution?

QUESTIONS PRESENTED – Continued

3. Has the courts' failure to enforce the automatic stay and the discharge protections given to debtors by the bankruptcy code denied this petitioner the equal protection of the law guaranteed by the Constitution?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, James F. George III and James F. George IV were parties to the proceeding in the District Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's order (per Manuel L. Real, DJ) granting respondents' motion to dismiss complaint for failure to state a claim upon which relief can be granted (Appendix ("Pet. App.") 4a-7a) is unpublished. The court of appeals' memorandum (per Alarcón, Trott, and Tashima, JJ) affirming (*id.* 1a-3a) is unpublished. The court of appeals' order denying rehearing and rehearing en banc (*id.* 8a) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals entered its memorandum on December 14, 2009, and denied rehearing and rehearing en banc on February 26, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

This petition draws into question the constitutionality of 11 U.S.C. § 365(d)(4) (Pet. App. 11a) "as applied." Pursuant to 28 U.S.C. § 2403(a) and Supreme Court Rule 29, this petition has been served on the Solicitor General of the United States.

Neither the court of appeals nor the district court certified to the Attorney General the fact that the constitutionality of an Act of Congress affecting the public interest was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Constitution, Title 11 U.S.C. § 101, *et seq.*, and 42 U.S.C. § 1983, relevant to this petition are reprinted in the Appendix at 9a-15a.

STATEMENT OF THE CASE

Petitioner filed a complaint in the United States District Court for the Central District of California seeking a declaration that 11 U.S.C. § 365(d)(4)[1] (Pet. App. 11a) is unconstitutional "as applied." The complaint also asserted claims that the City of Morro Bay and its agents had taken petitioner's property in violation of the Fifth Amendment to the Constitution, (*id.* 9a) thereby violating petitioner's civil rights pursuant to 42 U.S.C. § 1983 (*id.* 14a) and that the City and its agents had violated the automatic stay provisions of §§ 362(a)(3) and (b)(10) (*id.* 9a-10a), and the discharge provisions of § 524(a) (*id.* 12a) and § 727(b)

[1] All references to Title 11 U.S.C. § 101, *et seq.* are to that Title in effect in 1994. All further code citations shall be to Title 11 unless otherwise specified.

(*id.* 13a). Petitioner further sought to have the Bankruptcy court orders declared void as having been obtained by fraud and/or that the orders were void under § 524(a)(1) (*id.* 12a).

In an order remarkable for its fundamental inconsistency with governing precedent of this Court, dozens of panel decisions of the Ninth Circuit, and other Circuits, the district court granted the City's motion to dismiss based on res judicata and/or collateral estoppel and dismissed the complaint with prejudice as barred by the doctrine of res judicata, collateral estoppel, and the applicable statute of limitations. (Pet. App. 4a-7a).

The court of appeals, also refusing to follow this Court's governing precedent and their own precedent as to when a claim is ripe for either an "as applied taking" claim or a claim under 42 U.S.C. § 1983 for violation of civil rights (*id.* 14a), affirmed the district court's dismissal of these claims, stating that the actions were barred by the doctrine of res judicata and collateral estoppel because they could have been raised in prior action or were litigated in prior bankruptcy proceedings. The court concluded that all remaining contentions were unavailing (*id.* 2a). The Ninth Circuit denied petitioner's request for rehearing and rehearing en banc (*id.* 8a).

1. The district court's and the Ninth Circuit's decisions were based on proceedings on a *motion* that had taken place in the bankruptcy court and orders

entered by that court on the *motion* years before the takings claims were ripe.

The motion was for an order that the debtors in possession be required to surrender possession of the lease site to the City, pursuant to their reading of § 365(d)(4), (*id.* 11a) because they had not made a motion to assume the lease before the 60 days were up. The bankruptcy court, following the Ninth Circuit's ruling in *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077 at 1079 (9th Cir. 1989), that the *debtor in possession* was required to file a formal motion to assume the lease before the sixty days were up, granted the motion and ordered the petitioner to surrender the property to the City. Petitioner refused to voluntarily surrender the premises under the belief that to do so would be a relinquishment of her Constitutional rights under the Fifth Amendment (Pet. App. 9a).

Without obtaining relief from the automatic stay, the City obtained a writ of possession from the bankruptcy clerk and had the County sheriff physically oust petitioner from the premises.

Petitioner filed an action in state court for inverse condemnation seeking payment for the leasehold and improvements. The state court dismissed the action based on the res judicata effect of the bankruptcy court's order. After appeals the order became final on October 3, 2005. The instant action was filed in the district court on September 27, 2007,

within the two year statute of limitations in effect at the time the action accrued.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. *First,* for twenty-two years both federal and state courts have differed on the meaning of the term "rejection" in § 365 of the bankruptcy code (*id.* 11a). During that time this Court has declined to address the issue and has denied Petitions for Certiorari in at least nine cases involving this section of the bankruptcy code. The decisions of the courts below have, in many instances, allowed debtors' property to be taken without compensation in violation of the Fifth Amendment to the Constitution and denied debtors their state law contract rights. (Pet. App. 9a).

The decision to assume or reject an executory contract or unexpired lease arises in most business bankruptcies. Because of the increased number of businesses filing for bankruptcy protection (60,837 in 2009 and 14,607 in the first quarter of this year) it is essential that this court finally clarify for the courts below exactly what rejection means. As it stands now, the success of a reorganization case rests largely on the district in which the case is filed. This defeats the requirement that the bankruptcy laws be enforced uniformly. It also fails to recognize that the two primary objectives of Chapter 11 are preserving going

concerns and maximizing property available to satisfy creditors.

There is also disagreement in State Supreme Courts and courts of appeals over the interpretation of whether rejection constitutes a termination or merely a breach of the contract or unexpired lease.

Therefore, a decision by this Court as to the meaning of rejection will have wide spread consequences for debtors and creditors alike and has the potential of saving countless hours of the courts' time. This Court's authoritative guidance is badly needed in this vital area of bankruptcy law.

Just last year this Court denied certiorari in *N.C.P. Marketing Group, Inc. v. BG Star Productions, Inc.*, 129 S.Ct. 1577, 173 L.Ed.2d 1028 (2009) regarding issues under § 365. (Pet. App. 11a). Justice Kennedy and Justice Breyer were of the opinion that the division in the courts over the meaning of § 365(c)(1) was an important one to resolve for Bankruptcy Courts and for businesses that seek reorganization. However, they felt that the petition for certiorari in that case was not the most suitable case for the resolution of that conflict, but in a different case the Court should consider granting certiorari on that significant question. This case poses the same significant issue as the *N.C.P.* case because essential to resolving that case, the Court would have to explain exactly what happens to an executory contract or unexpired lease upon rejection. If a contract cannot be assumed does that mean the contract is rejected?

What happens to contracts or unexpired leases that are neither assumed nor rejected? Thus, the Court needs to make certain for the lower courts, and state courts as well, exactly what is meant by the term "rejection."

Second, the decision of the district court and the Ninth Circuit that the 42 U.S.C. § 1983 (*id.* 14a) and the "as applied" claims were barred by res judicata and/or collateral estoppel because they *could* have been brought in the bankruptcy proceeding is in direct conflict with governing precedent of this Court, numerous panel decisions of the Ninth Circuit, and other circuits as to when a cause of action for the taking of property under the Fifth Amendment is ripe (*id.* 9a).

The district court and the Ninth Circuit also failed to recognize that bankruptcy courts are prohibited from hearing personal injury cases and that this court has determined that all 42 U.S.C. § 1983 (Pet. App 14a) claims are personal injury claims. *See Wilson v. Garcia,* 471 U.S. 261, 280, 105 S.Ct. 1938 (1985).

Third, the decision below failed to address the claim that the actions of the City and its agents in physically removing the petitioner from the property was void as a violation of the automatic stay and/or the debtor's discharge.

I. Certiorari Is Warranted Because Federal And State Supreme Courts Disagree As To Whether Rejection Under § 365 Is A Breach Or A Termination of Executory Contracts And Unexpired Leases.

Section 365 was added to the bankruptcy code in 1978 and was amended in 1984 to included provisions for unexpired nonresidential leases. These provisions added § 365(d)(3)-(4), § 362(b)(10), and § 541(b)(2) to the Code. At the same time Congress added § 362(h). (Pet. App. 10a-13a).

For the past twenty-two years the debate has raged over whether "rejection" constituted a breach or termination of the lease. Since these sections were added there have been only five published cases that have considered these amendments *in pari materia*. *See In re Musikahn Corp.*, 57 B.R. 938-39 (Bkrtcy. E.D.N.Y. 1986); *In The Matter of Hejco, Inc.*, 87 B.R. 80, 83 (Bkrtcy. D. Neb. 1988); *In re Memphis-Friday's Associates*, 88 B.R. 830 (Bkrtcy. W.D. Tenn. 1988); *In re Damianopolus*, 93 B.R. 6 (Bkrtcy. N.D.N.Y. 1988); *In The Matter of Emory Properties, Ltd.*, 106 B.R. (Bkrtcy. N.D. Ga. 1989). This failure to consider the amendments as a whole has caused the courts to conclude that rejection was the same as termination.

The code states that the rejection of an executory contract or unexpired lease of the debtor *constitutes* a breach of such contract or lease, if the contract has not been assumed under this section *or* a plan confirmed under chapter 9, 11, 12, or 13, immediately

before the date of the filing of the petition. *See* § 365(g)(1). (Pet. App. 11a.)

Section 541(b)(2) (*id.* 13a) makes it clear that unless a non-residential lease terminates at the expiration of the stated term of the lease before or during the bankruptcy case, the lease remains property of the estate. Section 362(b)(10) (*id.* 10a) prohibits any act by a lessor of a nonresidential lease to obtain possession of such property from the debtor unless the lease has terminated by the expiration of the stated term before or during the bankruptcy case.

It is difficult to understand how any court can determine that a lease has terminated by rejection when the clear language of the statute makes certain that *unexpired* leases remain in the estate and are protected by the automatic stay.

The confusion that surrounds rejection comes from the courts' failure to read the bankruptcy statute as a whole. Another source of confusion is the courts' practice of adding words to the statute and the failure to understand that the debtor, trustee, debtor in possession, and the estate are all separate entities. The trustee *or* the debtor in possession represents the *estate*. Section 1101(1) (*id.* 13a) makes it clear that the "debtor in possession" means the debtor *except* when a person that has qualified under section 322 of this title is serving as trustee in the case; (emphasis added) (*id.* 14a). Numerous provisions of the code and the Federal Rules of Bankruptcy Procedure refer to the trustee, debtor in possession, *or* debtor. *See* FRBP

6006(b) (Pet. App. 15a). While debtors in possession have all the rights powers, and duties of a trustee, they are a legally distinct entity. *Hillis Motors, Inc. v. Hawaii Auto Dealers Ass'n,* 997 F.2d 581, 585 n.6 (9th Cir. 1993). Sections 1113(b)(1) and 1114(c)(1) state, "* * * the debtor in possession or trustee (hereinafter *in this section*, 'trustee' shall include a debtor in possession), * * * " (emphasis added). The failure of Congress to include the term "debtor in possession" in § 365(d)(4) (*id.* 11a) can only mean that that section did not apply to debtors in possession.

The Ninth Circuit's improper inclusion of the term "debtor in possession" into § 365(d)(4) has resulted in these grossly inequitable consequences to this petitioner. *See Sea Harvest Corp. v. Riviera Land Co., supra*, 868 F.2d at 1079. This Court has finally made it clear that "a debtor in possession has until a reorganization plan is confirmed to *decide* whether to accept or reject an executory contract." *Florida Dep't of Rev. v. Piccadilly,* 554 U.S. 33, 128 S.Ct. 2326 (2008).

Because of the Ninth Circuit impermissible inclusion of the term "debtor in possession" into § 365(d)(4) and their failure to recognize the protections in §§ 362(b)(10) and 541(b)(2) this petitioner lost her life savings and has had to fight for her Constitutionally mandated right to payment for that which has been taken. (Pet. App. 10a-13a).

Chief Justice Hill of the Wyoming Supreme Court (dissenting) stated that "[c]onstruing, or deciphering,

a statute such as 11 U.S.C. § 365 is a daunting task. The statute itself is nine pages long (in USCS), and the interpretative notes and decisions section associated with that statute take up over 175 pages." *Kolschefsky v. Harris,* 72 P.3d 1144, 1148, n.1 (Wyo. 2003).

The interpretative notes take up over 260 pages in the 2008 edition including the supplement, an addition of 85 pages since 2003.

In the case of *Mayfield Smithson Enterprises v. Com-Quip,* 896 P.2d 1156, 1162 n.6 (N.M. 1995), the Supreme Court of New Mexico recognized that "[t]here is disagreement among the federal circuits about whether rejection of a lease pursuant to 11 U.S.C. § 365 (*id.* 11a) serves to terminate the lease." That court found that the bankruptcy court's rejection surrendered all property rights to the lessor, it was logical that there was an extinguishment of the leasehold and any liens encumbering the leasehold.

Herbert A. Ross, an Alaska bankruptcy judge, authored a nineteen page opinion in an effort to make some sense of § 365. *In re Bergt,* 241 B.R. 17 (Bkrtcy. D. Alaska 1999). He, like many other courts, relied heavily on two law review articles written by Professor Michael T. Andrew, *Executory Contracts In Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988), and *Executory Contracts Revisited: A Reply to Professor Westbrook,* 62 U. COLO. L. REV. 1 (1991) and the article by Professor Jay Lawerence Westbrook, *A Functional Analysis of*

Executory Contracts, 74 MINN. L. REV. 227 (1989). The essence of their combined 198 pages, and the point they both agree on is that "rejection does not cancel, repudiate, or terminate contracts; . . . and that rejection does not, like bankruptcy law's 'avoiding powers,' terminate state-law rights in or to specific property."

This approach has been followed by the Second, Third, Fifth and Eighth Circuits. *See In re Lavigne*, 114 F.3d 379, 386-87 (2nd Cir. 1997); *In re Teleglobe Communications Corp.*, 304 B.R. 79, at 83 (D. Del. 2004) citing *In re Columbia Gas Systems*, 50 F.3d 233, 239 n.8 (3rd Cir. 1995); *In re Austin Dev. Co.*, 19 F.3d 1077, 1082-83 (5th Cir. 1994), *cert. den.*, 513 U.S. 874, 115 S.Ct. 201 (1994); and *In re Modern Textiles, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990) where the court cited the language of sections 365, 365(g)(1) and 502(g) (Pet. App. 11a) in support of its conclusion that the trustee's rejection of the lease operated as a breach of an existing and continuing legal obligation of the debtor, not as a discharge or extinction of the obligation itself.

A panel in Division Eight of the Second Appellate District of California decided that the rejection of the debtor's ground lease did not terminate the lease, stating that the *plain language* of the bankruptcy statute used the terms "breach" and "termination" as if they had different meanings and decided that rejection of a lease was a breach. *McLaughlin v. Walnut Properties, Inc.*, 14 Cal. Rptr. 3d 369 (Cal. App. 2 Dist. 2004).

When the statutes are read together it becomes clear that rejection does nothing more than determine that any claim a lessor has for a breach of the agreement will become a prepetition unsecured claim. *See* §§ 365(g)(1) and 502(g). (Pet. App. 12a). However any claim that would not be allowed under state law will not be allowed under § 502(b)(1). (Pet. App. 11a). *See Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199, 1204 (2007), explaining that any claim that would be unenforceable under state law could not be allowed, and any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy. Adding that such a reading of § 502(b)(1) is consistent not only with the plain statutory text, but also with the settled principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying law creating the debtor's obligations, * * *."

The plain reading of the statute makes it plain that if the City could not have taken the lease site and improvements absent a bankruptcy case, they were not entitled to do so in the bankruptcy case. In spite of these statutory protections, the City physically removed petitioner from the premises and took the premises for their own use. Petitioner was subsequently denied just compensation for the taking in a state court action. That action became final on October 3, 2005. Petitioner filed the action in district court on September 27, 2007 and within the 2 year statute of limitations in effect at the time petitioner's claim accrued.

II. Certiorari Is Warranted Because The Claims Under 42 U.S.C. § 1983 And The "As Applied" Taking Claim Could Not Have Been Brought Before Petitioner Was Denied Compensation.

A. The Decision Below Conflicts With The Holdings Of This Court And Other Circuits As To When A Claim Under 42 U.S.C. § 1983 Or An "As Applied" Taking Claim Is Ripe For Adjudication.

The Ninth Circuit court's finding that petitioner's claims for violation of civil rights under 42 U.S.C. § 1983 (Pet. App. 14a) and the "as applied" claim "could have been brought in the bankruptcy proceeding" (*id.* 2a) clearly conflicts with this Court's holding in *Williamson Co. Regional Planning v. Hamilton Bank,* 473 U.S. 170, 194, 105 S.Ct. 3108, 3120 (1985) which made it clear that before a party can bring a 42 U.S.C. § 1983 claim for a taking, they must have been denied compensation in state court, ("because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied."). *Id.* at 194, n.13.

The Ninth Circuit panel's ruling that the claims could have been brought in the bankruptcy proceedings conflicts with numerous other panel rulings in the Ninth Circuit that follow the *Williamson* case. *See Macri v. King County,* 126 F.3d 1125 (9th Cir. 1997), *cert. den.*, 522 U.S. 1153, 118 S.Ct. 1178 (1998) stating that "it is axiomatic that a taking violation is

not complete until the plaintiff has sought compensation through state remedies and been denied, * * * ." *Sinaloa Lake Owner's Ass'n v. City of Simi Valley,* 882 F.2d 1398 (9th Cir. 1989) "because the failure to seek compensation in state court renders the taking claim unripe, and lack of ripeness deprives the court of subject matter jurisdiction." *Dodd v. Hood River County,* 59 F.3d 852 (9th Cir. 1995) "federal court lacks jurisdiction to consider as-applied claim until determination is reached that just compensation has been denied by the state." *See also Flying J Inc. v. City of New Haven,* 549 F.3d 538 (7th Cir. 2008) and *Cormack v. Settle-Beshears,* 474 F.3d 528 (8th Cir. 2007). Each of these cases followed *Williamson Co. Regional Planning Comm. v. Hamilton Bank, supra.*

In *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 123 S.Ct. 1406, 1417 (2003) this court explained that the "jurisprudence involving physical takings is as old as the Republic and, for the most part, involves the straightforward application of the *per se* rules."

> "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, * * * regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, * * * ."

Id. at 1418 (citations omitted).

This Court in *Brown* found that all the Circuit Judges who have considered the compensation question have agreed that the just compensation required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain.

This case differs greatly from *Brown* in that the property taken by the City had substantial value. Not only did the City take a long term lease, it took the improvements constructed on the ground lease by the petitioner. It should be noted here that there were no defaults under the lease, the rent was fully paid in advance, and the City held a substantial security deposit.

The Fifth Amendment unequivocally states that no person shall be deprived of property without due process, nor shall private property be taken for public use without just compensation. (Pet. App. 14a). This court has held that the right to just compensation is mandatory and "cannot be taken away by statute." *Jacobs v. United States*, 290 U.S. 13, 17, 54 S.Ct. 26 (1933).

"The bankruptcy power is subject to the Fifth Amendment prohibition against taking private property without compensation and cannot be used to defeat traditional property interest." *United States v. Security Industrial Bank*, 459 U.S. 70, 75, 103 S.Ct. 407, 410 (1982).

The district court's refusal to follow governing precedent has denied this petitioner the protections

mandated by the Constitution and denied her of the equal protection of the law.

The Court should grant this petition not only to restore petitioner's rights but to ensure that future debtors are not summarily deprived of rights that are so fundamental.

B. The 42 U.S.C. § 1983 Claim And The "As Applied" Claim Could Not Have Been Brought In The Bankruptcy Proceedings.

The 42 U.S.C. § 1983 (Pet. App. 14a) and the "as applied" taking claim could not have been brought in the bankruptcy proceedings. Bankruptcy judges are prohibited from hearing personal injury claims. Title 28 U.S.C. § 157(b)(5) provides in pertinent part that "the district court shall order that personal injury tort * * * claims shall be tried in the district court in which the bankruptcy case is pending, * * * ."

This Court has held that all § 1983 claims are best characterized as personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 at 280, 105 S.Ct. 1938 at 1949 (1985).

III. The District Court Failed To Follow This Court's Holding And A Ninth Circuit En Banc Decision That Violations Of The Automatic Stay Are Void *Ab Initio*.

The City was repeatedly warned that their actions were violating the automatic stay and/or the

discharge injunction. Despite these warnings the City never attempted to petition the bankruptcy court for an order lifting the automatic stay. The City has never denied that it violated the stay, and yet the court found that the petitioner's claim that the City had violated the stay and/or discharge injunction were "unavailing." (Pet. App. 2a).

The principal purpose of the automatic stay is to preserve property for use in the reorganization of the debtor and to prevent dismemberment of the estate.

The Ninth Circuit panel's decision failed to follow this Court's governing precedent that actions taken in violation of the automatic stay are void. *Kalb v. Feuerstein,* 308 U.S. 433, 443, 60 S.Ct. 343 (1940) and the en banc decision in *In re Gruntz,* 202 F.3d 1074, 1082 (9th Cir. 2000). The Ninth Circuit has long held that violations of the automatic stay are void and of no effect. *In re Schwartz,* 954 F.2d 569, 572 (9th Cir. 1992). The *Schwartz* court cited cases from the Supreme Court, and the Second, Tenth, and Eleventh Circuits that all hold that violations of the automatic stay are void. (*Id.* collecting cases at 572.) The court reasoned that the bankruptcy code did not burden the debtor with the duty to take additional steps to secure the benefits of the automatic stay.

What is more confounding is that Judge Tashima, a member of the panel in this case, had authored the opinion in *Taxel v. California Employment Dev. Dep't (In re Del Mission)*, 98 F.3d 1147 (9th Cir. 1996) which stated that the automatic stay remained in effect

until the bankruptcy estate terminates under § 362(c) and until such time as the estate terminates, the state was obligated to abide by the stay. *Id.* at 1150. "Without doubt, 'a creditors knowing retention of property of the estate constitutes a violation of § 362(a)(3)' * * * the onus to return property is placed on the possessor, it does not fall on the debtor to pursue the possessor." *Id.* at 1151. (Pet. App. 9a-10a).

Congress felt so strongly that violations of the automatic stay should not be condoned by the courts that it passed § 362(h) providing for punitive damages for any person injured by a violation of the stay. The provision was added by the 1984 amendments as was § 362(b)(10) providing that *unexpired* nonresidential leases were protected by the stay and prohibited lessors of those properties from obtaining possession unless the term of the lease expired before or during the bankruptcy case. (Pet. App. 10a).

The Ninth Circuit panel's failure to follow this Court's governing precedent and an en banc decision of its own circuit has deprived this petitioner of the equal protection of the law.

The Ninth Circuit panel's decision has so far departed from the accepted and usual course of judicial proceedings and has sanctioned the district court's departure from the established law that this case calls for this Court's supervisory powers.

At a minimum, this Court should require the Ninth Circuit to abide by the proceedings of this Court and the statute as written by Congress and

should remand this case for the district court to make factual findings on the City's violation of the automatic stay.

A. The Decision Below Failed To Address The Effect Of The Discharge Injunction.

Judge Klein of the Ninth Circuit Bankruptcy Appellate Panel, in a thoughtful discussion of § 524 explained that the discharge voids any judgment at any time obtained as the personal liability of the debtor as to any debt discharged. It is "good against the world" and cannot be waived. He explained how Congress changed the wording of § 524(a) (Pet. App. 12a) from "voids any judgment therefore or thereafter obtained in *any other court*" to read "*any judgment at any time obtained*" *In re Gurrola*, 328 B.R. 158 (9th Cir. BAP 2005).

Under the clear wording of the statute, any judgment that the City obtained after the discharge would be void.

While the automatic stay was in effect, the City filed an unlawful detainer against petitioner. The state court refused to accept the debtor's argument that the automatic stay was in effect. After the discharge was entered, the City continued the action and the state court entered a judgment despite proof that a discharge had been entered. The judgment was then recorded. This judgment has remained on the record despite numerous request that the City have it removed.

The action by the City and its agents has caused irreparable harm to petitioner and to all other creditors in the bankruptcy case. If in fact the lease was actually rejected, the City then became an unsecured creditor. Because there was no basis in either state law or the lease itself for the City to claim possession of the lease site, any claim that the City would have had against the estate would not have been allowed. Instead, the actions of the bankruptcy court in granting the surrender order elevated the City to super-priority status and had the effect of giving the entire value of the estate to an unsecured creditor. The other creditors received nothing and even secured creditors lost their security.

Because the writ of possession was obtained from the clerk of the bankruptcy court after the discharge was entered, the writ was void under the clear wording of the statute.

The Court should grant this petition for certiorari because the courts in the Ninth Circuit are sorely in need of this Court's guidance in this significant area of bankruptcy law. Bankruptcy courts are bound to follow the decisions of the Ninth Circuit. Because the Ninth Circuit has held that rejection wipes out all the debtor's rights in and to a specific piece of property, these constitutional and statutory violations will continue to occur. The Ninth Circuit should not be allowed to run roughshod over this Court's holding or the statutes as enacted by Congress. There can hardly be a more compelling issue of public importance than where a court's misinterpretation of

a statute sets the precedent for future Constitutional violations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARGIE R. GEORGE

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES F. GEORGE, III; et al., Plaintiffs, and MARGIE R. GEORGE, Plaintiff-Appellant, v. CITY OF MORRO BAY; et al., Defendants-Appellees.	No. 08-55961 D.C. No. 2:07-cv-06302-R-JC MEMORANDUM* (Filed Dec. 14, 2009)

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted November 17, 2009**

Before: ALARCÓN, TROTT, and TASHIMA, Circuit Judges.

Margie R. George appeals pro se from the district court's order dismissing her 42 U.S.C. §1983 action as

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

barred by the doctrines of res judicata and collateral estoppel. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (res judicata); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (collateral estoppel). We affirm.

The district court properly dismissed George's claims as barred by the doctrine of res judicata because George could have raised them in her prior bankruptcy proceedings. *See Stewart*, 297 F.3d at 956 ("Res judicata, or claim preclusion, prohibits lawsuits on any claims that were raised or could have been raised in a prior action.") (internal citation, quotation marks, and italics omitted). The district court also properly dismissed George's takings claims as barred by the doctrine of collateral estoppel because they are foreclosed by issues George litigated in her prior bankruptcy proceedings. *See McQuillion*, 369 F.3d at 1096 (applying collateral estoppel where issues at stake were actually litigated by the party against whom preclusion is asserted and were necessary to the earlier judgment).

George's remaining contentions are unavailing.

Because appellees' request for sanctions for a frivolous appeal was not separately filed, we deny the request without prejudice to refiling a timely separate motion. *See* Fed. R. App. P. 38; 9th Cir. R. 39-1.6; *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 (9th Cir. 2004) (denying without prejudice a

Rule 38 request made in an appellate brief rather than a separately filed motion).

AFFIRMED.

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES F. GEORGE, III, MARGIE R. GEORGE, and JAMES F. GEORGE, IV, Plaintiffs, v. CITY OF MORRO BAY, DAVID R. HUNT, PHILIP F. SINCO, and WILLIAM YATES, Defendants.	Case No.: CV 07-6302 R (JCx) ~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED DATE: April 28, 2008 TIME: 10:00 a.m. PLACE: 312 N. Spring Street, Los Angeles, CA 90012 DEPT: 8 JUDGE: Manuel L. Real

On September 27, 2007, James F. George III, Margie R. George, and James F. George, IV, proceeding *pro se*, filed a complaint in this Court against the City of Morro Bay, David R. Hunt, Phillip F. Sinco, and William Yates. According to the Plaintiffs, the Complaint alleges that Plaintiffs are entitled to damages against the City "for actions taken in violation of the automatic stay and/or the George's Bankruptcy Discharge." Plaintiffs further request that this court declare the order entered by the Bankruptcy court on April 15, 1996 void as having been obtained by fraud on the Court and void in violation of the discharge provisions of 11 U.S.C. §§524(a) and 727(b)." (Plaintiffs' Opposition to Motion to Dismiss page 2 line 1)

Defendants' Motion to Dismiss Complaint For Failure To State A Claim For Which Relief Can Be Granted was set for, and went forward on, April 28, 2008. Plaintiffs appeared in *pro se*. The Defendants appeared by and through Robert W. Schultz. The Court took judicial notice of several documents presented by the Defendants and Plaintiffs. The Court read and considered the papers filed in connection with this motion as well as oral argument and has reached the following conclusions:

Although the Court's review is generally limited to the contents of the complaint when considering a 12(b)(6) Motion to Dismiss, *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996), Ninth Circuit authority allows the Court to consider documents referenced extensively in the complaint, documents that form the basis of Plaintiffs' claim, and matters of

judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted (*United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003)). Therefore, the Court has taken into consideration the Request for Judicial Notice filed by both the Plaintiffs and the Defendants.

Res judicata, like the related doctrine of collateral estoppel, is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, encourage reliance on adjudication, and promote comity between the state and federal courts. *Allen v. McCurry*, 449 U.S. 90, 94, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Here, Plaintiffs' complaint relates back to a 1994 United States Bankruptcy Court surrender order, which has been fully litigated and upheld on appeal. As stated by the Ninth Circuit Court of Appeals, "the record indicates the Georges have litigated at least twice with the City regarding the surrender of their lease under 11 U.S.C. §365(d)(4)." *In re George*, 144 Fed. Appx. 636 (9th Cir. 2005). Plaintiffs' claims have been extensively litigated in bankruptcy court, state court, district court and at the Ninth Court of Appeals. Numerous findings of fact and conclusions of law, upon which the court would need to find in favor of Plaintiffs in the instant case, have already been actually litigated to a final decision in this Court, and have already been affirmed on appeal as well. Therefore, all of Plaintiffs' claims are barred by res judicata and collateral estoppel. Because no amendment of the

complaint could cure the deficiencies identified above, leave to amend is not proper.

Accordingly, the Court hereby GRANTS Defendants' motion to dismiss with prejudice. Defendants may file a separate motion for attorney's fees.

IT IS SO ORDERED.

Dated: May 07, 2008

By:

/s/ Real
MANUEL L. REAL
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES F. GEORGE, III; et al., Plaintiffs, and MARGIE R. GEORGE, Plaintiff-Appellant, v. CITY OF MORRO BAY; et al., Defendants-Appellees.	No. 08-55961 D.C. No. 2:07-cv-06302-R-JC Central District of California, Los Angeles ORDER (Filed Feb. 26, 2010)

Before: ALARCÓN, TROTT and TASHIMA, Circuit Judges.

The Panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Margie R. George's petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Constitutional and Statutory provisions involved in this case are:

UNITED STATES CONSTITUTION:

Amendment V:

No person shall * * * , be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

TITLE 11 UNITED STATES CODE:

(All statutes under title 11 refer to the section in effect in 1994.)

11 U.S.C. §§ 362(a)(3) and (6):

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, * * * operates as a stay to all entities, of –

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

---

11 U.S.C. § 362(b)(10):

(b) The filing of a petition under section 301, 302, or 303 of this title, * * * does not operate as a stay –

(10) under section (a) of this section, of any act by a lessor to the debtor under a lease nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.

---

11 U.S.C. § 362(c):

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

---

11 U.S.C. § 362(h):

(h) an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

---

11 U.S.C. § 365(d)(4):

(d)

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall surrender such nonresidential real property to the lessor.

---

11 U.S.C. § 365(g)(1):

(g) except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under Chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition;

---

11 U.S.C. § 502(b)(1):

(b) Except as provided in subsection (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of

such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

---

11 U.S.C. § 502(g):

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

---

11 U.S.C. § 524(a):

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under 727 * * * of this title, * * *

---

11 U.S.C. §541(b)(2):

(b) Property of the estate does not include –

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

---

11 U.S.C. § 727(b):

(b) * * * a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, * * * whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

---

11 U.S.C. §1101(1):

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

---

42 U.S.C. § 1983:

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State, * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, * * *

Federal Rules of Bankruptcy Procedure:

Rule 6006:

(a) Proceeding to Assume, Reject, or Assign.

A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

(b) Proceeding to Require Trustee to Act.

A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.

(2)

No. 09-1453

Supreme Court, U.S.
FILED
SEP 22 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARGIE R. GEORGE,

Petitioner,

v.

CITY OF MORRO BAY; DAVID R. HUNT; PHILIP F. SINCO; WILLIAM YATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The Petitioner, Margie R. George, respectfully submits this Supplemental Brief to address the City's failure to respond to the Petition for Certiorari, and to apprise this Court of cases relevant to the issues presented that have become available after the petition was filed.

THE CITY'S FAILURE TO RESPOND TO THE PETITION FOR CERTIORARI

A brief in opposition to a petition is not mandatory. However, Rule 15.2 of this Court admonishes Counsel that they have an obligation to the Court to bring to the Court's attention any perceived misstatements in the petition.

The petition clearly states that the City took Petitioner's property, and in so doing, violated not only the Fifth Amendment to the Constitution but the Automatic Stay and Discharge provisions of the Bankruptcy Code as well.

Respondents failure to advise this Court of any misstatement of fact or law amounts to an admission that Petitioner's position on the issues presented are true and correct and that this Court needs to address these issues to prevent further Constitutional violations.

Respondents cannot deny any points of law or facts raised in the petition or offer any argument as

to why this Court should not grant this Petition for Certiorari.

Because this Court has held that violations of the automatic stay are void, should this Court decline to grant this petition, the Court should at least remand this case to the district court to provide the Petitioner a remedy for those violations.

RECENTLY DECIDED CASES RELEVANT TO THE ISSUES PRESENTED

A. Cases Involving A "Taking" Under The Fifth Amendment

This Court's recent decision in *Stop The Beach Renourishment, Inc. v. Florida Department of Environmental Protections,* 130 S. Ct. 2592 (2010) advances the theory that "[I]f a legislature *or a court* declares that what once was an established right of private property no longer exists, it has taken that property no less than if the State had physically appropriated it. . . ." *id.* at 2602 (emphasis in original). This is precisely the issue presented in the petition that where a court orders that a person must surrender their property pursuant to 11 U.S.C. § 365(d)(4), that statute "as applied" constitutes a taking without compensation of a debtor's property.

B. Cases Involving "Rejection" Under 11 U.S.C. § 365(d)(4)

The Honorable Jeffrey R. Hughes, United States Bankruptcy Judge in the Western District of Michigan has expressed the need for this Court to reexamine what is now meant by the term "rejection". See *In re Lucre, Inc.* 2010 Bankr. *LEXIS* 2336 at *74 (Bkrtcy. W.D. Mich. July 20, 2010).

In re Silver Fox, LLC, 2010 Bankr. *LEXIS* 2066 at *14 (Bkrtcy. D. N.J. July 24, 2010) states that in a Chapter 11 case, where a debtor has neither assumed nor rejected a lease under § 365, that lease will be unaffected by the bankruptcy filing under the "ride through" doctrine.

In re Exide Technologies, 607 F.3d 957 (3d Cir. 2010) adds even more confusion to the meaning of "rejection". The court held that because the contract was not executory, Exide could not reject it. Thus, if a contract cannot be rejected, what is its status in the bankruptcy proceeding? The Honorable Judge Ambro, Circuit Judge, wrote separately, quoting 2 *Norton Bankruptcy Law and Practice* § 46:57 (3d ed. 2008) as finding that "[T]he Bankruptcy Code instructs us that rejection is a breach of the executory contract. It is not avoidance, rescission, or termination."

In *In re GCP CT School Acquisition, LLC,* 429 B.R. 817 (1st Cir. BAP, 2010) the Panel held that if a trustee failed to assume a lease within 120 days after

the entry of the order for relief, the lease is rejected and the trustee must *immediately surrender* the leasehold to the lessor.

In the case of *In re The Deli Den, LLC*, 425 B.R. 725, at 727 (Bkrtcy. S.D. Fla. 2010) the Court held that neither an adversary proceeding nor relief from the automatic stay were required to implement § 365(d)(4) and ordered the lessee to surrender the leasehold and vacate the premises although the lease was "unexpired". The bankruptcy court in *In re Jim Slemons Hawaii, Inc.*, No. 09-01802, 2010 WL 691499 (Bkrtcy. D. Hawaii Feb. 22, 2010) reached the same conclusion and ordered that Slemons had to surrender the premises to the lessor, thereby depriving the estate of a valuable asset although there were nine years left on the unexpired lease.[1] These two Courts thereby effectively nullified § 362(b)(10) and § 541(b)(2).

[1] Although this case and *In re Deli Den, Inc.* pre-date the Petition for Certiorari, Petitioner did not become aware of them until recently. They are offered to this Court to show how pervasive such orders are and that most cases under § 365(d)(4) are never published.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARGIE R. GEORGE